IN THE SUPREME COURT OF MICHIGAN

ADM File No. 2003-47

ADMINISTRATIVE ORDER PROHIBITING THE "BUNDLING" OF ASBESTOS-RELATED CASES

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COMMENTS OF THE COALITION FOR LITIGATION JUSTICE, INC., MICHIGAN MANUFACTURERS ASSOCIATION, MICHIGAN CHAMBER OF COMMERCE, MICHIGAN LUMBER AND BUILDING MATERIALS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN TORT REFORM ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION, AND INTERNATIONAL SAFETY EQUIPMENT ASSOCIATION,

IN SUPPORT OF AUGUST 9, 2006 ADMINISTRATIVE ORDER NO. 2006-6 PROHIBITING THE "BUNDLING" OF ASBESTOS-RELATED CASES

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On behalf of the Coalition for Litigation Justice, Inc., and other interested parties listed above, we appreciate the opportunity to provide comments on the Court's August 9, 2006 Administrative Order prohibiting the "bundling" of asbestos-related cases for settlement or trial. As leading business organizations that represent or insure defendants in Michigan asbestos cases, we support this Court's efforts to develop a fair and workable solution to Michigan's asbestos litigation problem. The Court's anti-bundling order is a significant step in the right direction. *See* Editorial, *Unbundling Asbestos*, Wall St. J., Aug. 21, 2006, at A10, *available at* 2006 WLNR 14482501; Editorial, *Judging Asbestos Claims Separately Makes Sense*, Detroit News, Aug. 21, 2006, *available at* http://www.detnews.com/apps/pbcs.dll/article?AID=/20060821/OPINION01/608210301/1008. And, as explained below, the order is consistent with the practice of a growing number of states. In our view, it would be a mistake for the Court to reverse course after December.

I. Anti-Bundling: Sound Policy Consistent With The Trend in Other States

Asbestos-related lawsuits filed by claimants who are not sick have plagued the courts in Michigan and across the nation for years.[1] Nationally, up to ninety percent of recent asbestos-related lawsuits have been filed by people who have no present impairment and may never become sick from asbestos exposure.[2] These filings are depleting resources needed to compensate cancer victims and have pushed an estimated eighty-five companies into

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1 *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 1, 29 (June 2002), *available at* http://www.nlcpi.org/books/pdf/Vol6Number6June2002.pdf.; Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

2 *See* Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186, *available at* 2004 WLNR 17888598; Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A15.

bankruptcy.[3] As the longtime manager of the federal asbestos multi-district litigation docket explained, "Only a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle" with other claimants who are not sick.[4]

So we welcomed this Court's order immediately prohibiting the "bundling" of asbestos cases for settlement or trial. The Court's order will help eliminate some of the non-injury cases historically filed in Michigan and allow the Michigan trial courts (and defendant companies) to focus their resources on the truly sick. We believe this is important and represents sound policy.

In the past, some courts encouraged the consolidation of asbestos cases at trial because the judges thought that joining the dissimilar cases could resolve the litigation more quickly.[5] Sick plaintiffs were used to "leverage" settlements for the non-sick. Several years ago, former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described how trial judges inundated with asbestos claims might feel compelled to adopt such procedural shortcuts:

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.[6]

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3 *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29.

4 *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E.D. Pa. Sept. 16, 1996) (Weiner, J.).

5 *See* Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 Pepp. L. Rev. 271 (2004).

6 *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 6 (1999) (statement of the Hon. Conrad L. Mallett, Jr.).

Now, however, there is a better understanding that bending procedural rules to put pressure on defendants to settle cases does not make cases go away; the practice invites new filings. It is an example of the law of unintended consequences at work. As Duke Law School Professor Francis McGovern has explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."[7] One West Virginia trial judge involved in that state's asbestos litigation acknowledged that, "we thought [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. . . . [I]t drew more cases."[8] Consolidations also raise serious due process issues because defendants lack a meaningful opportunity to defend against individual claims.[9]

Courts are beginning to appreciate that, in addition to fundamental fairness and due process problems, consolidating cases to force defendants to settle is a bit like using a lawn mower to cut down weeds in a garden — the practice may provide a temporary fix to a clogged docket, but ultimately the approach is likely to create more problems than it solves. For example, the Mississippi Supreme Court has severed several multi-plaintiff asbestos-related

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7 Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

8 *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000) (statement of Judge A. Andrew MacQueen).

9 *See, e.g.*, Editorial, *The Asbestos Burden*, Chicago Tribune, Sept. 25, 2002, at 24, *available at* 2002 WLNR 12661962 (former U.S. Solicitor General Walter Dellinger explaining, "What gets lost in a mass trial . . . is that a lot of plaintiffs aren't sick and a lot of the companies have nothing to do with asbestos.")

cases.[10] In one of the cases, *Harold's Auto Parts, Inc. v. Mangialardi,* 889 So. 2d 493 (Miss. 2004), the court called the joinder of 264 plaintiffs who alleged asbestos exposure over a seventy-five year period to products associated with 137 defendants a "perversion of the judicial system. . . ." *Id.* at 495.[11] In July 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions.[12] In 2005 and 2006, Georgia, Kansas, and Texas enacted laws that generally preclude the joinder of asbestos cases at trial. This Court's order fits squarely within this trend and is clearly a matter within the scope of the Court's inherent judicial powers. *See* Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253 (2005).

Some may have the opinion that the new order will clog the court system since each asbestos case must now be tried individually. Persons with that view might believe that bundling is necessary for court efficiency. But the history of asbestos litigation teaches otherwise. It is the practice of bundling that is responsible for attracting new claims, and the Court's order will help cure that problem. Michigan is likely to see fewer cases brought by persons whose claims

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10 *See, e.g., Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853 (Miss. 2005); *Illinois Cent. R.R. Co. v. Gregory*, 912 So. 2d 829 (Miss.2005); *3M Co. v. Hinton*, 910 So. 2d 526 (Miss. 2005); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005).

11 A North Dakota trial court recently cited *Mangialardi* as authority on the issue of improperly joined plaintiffs. *See North Dakota Asbestos Litig.*, Nos. 18-04-C-1106, 18-06-C-208, 18-06-C-209 (Grand Forks County Dist. Ct., N.D. Oct. 17, 2006) (order granting defendants' motion to sever improperly joined plaintiffs).

12 *See* Ohio R. Civ. P. 42(A)(2) ("In tort actions involving an asbestos claim, a silicosis claim, or a mixed dust disease claim, the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household.").

are either premature (because the individual is not sick) or actually meritless (because the person will never develop an asbestos-related impairment).

Furthermore, we do not have to speculate on the likely impacts of the order because we have the benefit of observing the same reforms operate with success in other states, including Ohio and Texas. Individualized justice has not clogged the courts in those states.

Finally, it must be remembered that the August 2006 order simply requires asbestos cases to be treated like other types of product liability actions. The notion of individualized justice for plaintiffs and defendants should not be perceived as somehow extraordinary. In fact, it is the past practice of joining asbestos claims that is extraordinary and out of step with the common practice in virtually all other tort litigations. *See* Peter Geier, *'Sea Change' in Asbestos Torts is Here*, Nat'l L.J., Oct. 31, 2005, at 1 (quoting Texas plaintiffs' lawyer Bryan Blevins as saying that changes in the law and court rules are making asbestos more like other tort litigation "in which cases are worked up on an individual basis, negotiated on an individual basis and tried on an individual basis.").

II. Inactive Docket Still Needed

In 2003, we filed a memorandum with this Court in support of a petition seeking the establishment of an inactive asbestos docket. At that time, we emphasized that (1) mass filings by non-sick plaintiffs, in Michigan and elsewhere, and often generated by for-profit litigation screenings, threatened payments to the truly sick, (2) the proliferation of cases filed by non-sick plaintiffs had contributed to numerous asbestos bankruptcies, and (3) in order to address these problems, a number of courts had adopted inactive dockets or similar case management tools that had proven both sound and effective. We attached to that prior submission various materials that demonstrated both the need for and effective use of such case management mechanisms. Since

that filing, more state courts have adopted inactive asbestos dockets and several state legislatures have enacted medical criteria-based reforms to give priority to the truly sick.

In May 2006, we filed a memorandum in support of the Court's February 23, 2006 proposed administrative order setting forth two medical criteria-based alternatives to prioritize asbestos trials. The reasons for implementing one of those approaches in Michigan still exist today, and we continue to fully support both of the Court's proposed alternatives in addition to the anti-bundling order.

CONCLUSION

We appreciate the step the Court has taken to improve the asbestos litigation environment. As a result of the Court's August 2006 anti-bundling order, Michigan now has a fairer system that focuses on the most deserving claimants. The order should help to reduce premature or meritless litigation brought by claimants who have no present physical impairment. In our view, it would be a mistake for this Court to reverse course and rescind its order after December. Such action would send the wrong signal and would create unnecessary confusion with respect to Michigan's handling of asbestos cases for settlement or trial. We also continue to strongly support more direct approaches to address filings by the unimpaired and the devastating "ripple effects" they produce on defendant companies and affected communities.

Respectfully Submitted,

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